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No. 98-909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12,
Petitioner,

v.

GARY A. BLOOM

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

In tacit recognition that the Eighth Circuit's decision in this case is squarely contrary to this Court's subsequent decision in *Marquez v. Screen Actors Guild*, 525 U.S. ——, 67 L.W. 4001 (1998)—and is hence legally indefensible—the respondent Gary Bloom in his brief in opposition constructs, and then defends, a very different court of appeals decision.

As the brief in opposition recasts the Eighth Circuit's decision, the court of appeals addressed the question of

"whether expunction of [a] 'membership in good standing' clause is an appropriate remedy where it is undisputed that the union actively misused the 'membership in good standing' language to coerce employees into joining [the union]." Br. in Opp. 6. And, in answering this question, says the brief in opposition, the court below merely held that, in the circumstances of this case, such a remedy is "appropriate" as a matter of "sound discretion" in unfair labor practice cases. *Id.* at 8. *See also id.* i ("Where a union wilfully misused its 'membership in good standing' union security clause . . . may the remedy . . . include an order expunging the misused clause from the contract?").

Very simply stated, the decision posited by the brief in opposition does not bear even a passing resemblance to the Eighth Circuit's decision in this case.

1. The Eighth Circuit decision, first of all, was *not* addressed to—indeed could not have been addressed to—"expunction of [a] 'membership in good standing' clause" as an "appropriate remedy." Br. in Opp. 6. As the National Labor Relations Board noted in approving the settlement agreements here—and as the court of appeals did not deny in reversing the Board's decision—"[t]hese revised settlement agreements provided that the above ["members in good standing"] union-security clause would be expunged and a new union-security clause substituted." Pet. App. 20a. Thus, the expunction of the "misused . . . 'membership in good standing' " clause here, Br. in Opp. 6, was an accomplished fact when this matter got to the Eighth Circuit.

Indeed, the revised settlement agreements provide that the new union-security clause would recite the three options available to employees for satisfying the "members of the Union . . . within the requirements of the National Labor Relations Act" provision. Pet. App. 21a. The clause itself goes on to explain that employees may satisfy the requirement to "become members of the Union": i) by becoming a full union member who pays "the Union's initiation fees and periodic dues;" ii) by becom-

ing a "regular service fee payer" who pays "service fees . . . equal to the Union's initiation fees and periodic dues;" or iii) by becoming an "objecting service fee payer" who pays "service fees . . . equal to . . . the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities." *Id.*

Nor is that all. The revised settlement agreements further provide that the Union is to notify the covered employees of the *change* in the collective bargaining agreement's union security clause, that the Union is also to inform the employees of the nonmembers' right to object to paying the non-collective bargaining portion of dues, and that the Union is to honor these objections by reducing the required dues and providing a detailed explanation of the reduction. Pet. App. 52a-53a.

2. The legal context here precludes a court of appeals from substituting its judgment for the NLRB's judgment as to what remedy is "appropriate" as a matter of "sound discretion" in unfair labor practice cases. *Cf.* Br. in Opp. 8. Congress has "delegate[d] to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323-324 (1994). Thus, the Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.* at 324 n. 10 (quotation marks omitted). That is so whether the Board's remedial determination takes the form of approving a proposed settlement agreement or the form of specifying the proper relief after finding that the unfair labor practices alleged in a complaint were in fact committed. *See NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 128 (1987) ("settlements constitute the 'lifeblood' of the administrative process, especially in labor relations").

Given this context, what the Eighth Circuit did, in fact, was to reverse the NLRB's approval of the revised settlement agreements *solely on a legal ground*—that any reference in a union security clause to the term "member" is so intrinsically "misleading and coercive" that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed" by that term. Pet. App. 12a. That ruling, as we demonstrated in our *certiorari* petition (at pp. 8-10) flies in the face of this Court's *Marquez* decision.

3. The brief in opposition's revisionist account of the Eighth Circuit's decision is belied not only by the court of appeals' stated grounds for its decision but by the order entered by the court below. Contrary to the brief in opposition, it is most certainly *not* true that "the court remanded with specific instructions for expunction of Local's 12's illegally applied 'union security' clause." Br. in Opp. 7. The settlement agreement union security clause did not contain the phrase "membership in good standing," and the new clause called for in the settlement had never been "illegally applied."

That being so, the Eighth Circuit's "Instructions and Order" to the NLRB mandated that "[t]he offending union security clause *contained within the third settlement agreement* shall be deleted in its entirety." Pet. App. 13a (emphasis added). What is more, the Eighth Circuit's "Order" directed the inclusion of specific contract language in the parties' collective bargaining agreement in place of the new language the parties had negotiated in their attempt to settle this case. *Id.* 13a & 14a. All of this is of a piece with the Eighth Circuit's erroneous legal ruling, and none of it has anything to do with the brief in opposition's version of the ruling below.

4. In the end, the brief in opposition acknowledges that the Eighth Circuit's opinion "condemn[ed]" all union security clauses using the term "member" as "deceptive

and facially invalid." Br. in Opp. 6. The brief in opposition attempts to take the sting out of this concession by adding that the "condemnation was not necessary to the court's underlying remedial decision in this case." *Id.* And, in the same vein, the brief in opposition asserts that when "[t]he Eighth Circuit stated broadly that it would 'no longer uphold or enforce' a union security clause that uses the term 'membership' . . ., this statement was dicta." *Id.* n. 2.

These palliatives will not do. It is apparent from the face of the Eighth Circuit's opinion that the court of appeals did *not* view its "condemnation" of all union security clauses using the term "member" as being "not necessary to the court's underlying remedial decision." Br. in Opp. 6. Nor did that court view its sweeping statement that "it would 'no longer uphold or enforce' a union security clause that uses the term 'membership,' " as "dicta." *Id.* n. 2.

Given the terms of the revised settlement agreements and the limited role of the courts of appeals in passing on NLRB settlement agreements, it is impossible to discern any ground for the court of appeals' reversal of the NLRB's decision other than the erroneous ground so boldly stated in the Eighth Circuit's opinion—that " 'member' is not a term of 'art,' . . . but one of deception." Pet. App. 12a. That statement of the law, of course, inverts the *Marquez* Court's authoritative statement of the law—"the relevant provisions of § 8(a)(3)[, in particular, the term 'membership,'] have become terms of art." *Marquez*, 67 L.W. at 4005.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the Eighth Circuit and remand this case for further consideration in light of *Marquez v. Screen Actors Guild, supra.*

Respectfully submitted,

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